

30 (b) (6) Abbott (Fishman, David) - Vol II

March 20, 2008

Chicago, IL

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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In re: PHARMACEUTICAL INDUSTRY) MDL DOCKET NO.
)
AVERAGE WHOLESALE PRICE) CIVIL ACTION
)
LITIGATION.) 01CV12257-PBS
----- x

VOLUME II

The videotaped 30 (b) (6) deposition of ABBOTT
(DAVID FISHMAN), called by the United States for
examination, taken pursuant to subpoena and pursuant
to the Federal Rules of Civil Procedure for the
United States District Courts pertaining to the
taking of depositions, taken before Rachel F. Gard,
Certified Shorthand Reporter, at 77 West Wacker
Drive, Suite 3500, Chicago, Illinois, commencing at
8:35 a.m. on the 20th day of March, A.D., 2008.

202-220-4158

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<p>1 MS. ST. PETER-GRIFFITH: We have less than 2 five minutes left on the tape. I'm done with this 3 document. Why don't we take a break.</p> <p>4 THE VIDEOGRAPHER: Going off the record at 5 2:15 p.m.</p> <p>6 (A short break was had.)</p> <p>7 (Exhibit Fishman 017 8 marked as requested.)</p> <p>9 THE VIDEOGRAPHER: Beginning of Videotape No. 10 5, the deposition of Mr. Fishman. We're back on 11 the record at 2:29 p.m.</p> <p>12 BY THE WITNESS:</p> <p>13 A. They look like they're both the same 14 document.</p> <p>15 Q. Oh, yes, they are. I'm sorry. I think 16 that -- I'm only interested in the first page.</p> <p>17 A. Oh, I'm sorry. I should keep both of 18 them?</p> <p>19 Q. Because they're two different versions 20 the same --</p> <p>21 A. One is a copy, one is the sendee.</p> <p>22 Q. Correct.</p>	<p>1 MS. CITERA: Table this. I'm going to send 2 this email.</p> <p>3 THE WITNESS: Give it back?</p> <p>4 MS. ST. PETER-GRIFFITH: Hold it in front of 5 you because it's already been marked, but we will 6 --</p> <p>7 (Exhibit Fishman 018 8 marked as requested.)</p> <p>9 MS. ST. PETER-GRIFFITH: I believe, Toni, that 10 those are the only two versions that we found of 11 that document.</p> <p>12 MS. CITERA: Okay.</p> <p>13 BY THE WITNESS:</p> <p>14 A. I'm assuming you would like me to read 15 this?</p> <p>16 Q. Yes, please. Yes. That will give Toni 17 time to text, too.</p> <p>18 MS. CITERA: I'm done typing, so ... Are we 19 on?</p> <p>20 MS. ST. PETER-GRIFFITH: Yes.</p> <p>21 MS. CITERA: Sorry.</p> <p>22 MS. ST. PETER-GRIFFITH: That's Exhibit 18,</p>
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<p>1 MS. CITERA: You know, this to me seems to be 2 privileged. And so I'm just wondering if -- I 3 don't know why it was produced.</p> <p>4 MS. ST. PETER-GRIFFITH: Do you want -- Do you 5 want to make an inquiry, and I'll defer it to a 6 later point in time?</p> <p>7 MS. CITERA: Sure. Has this been used as an 8 exhibit in another deposition? Can you tell me 9 that?</p> <p>10 MS. ST. PETER-GRIFFITH: I don't think so 11 because I'm pretty sure the only person we would 12 have used it for would have been Tobiason, and this 13 wasn't produced then. We didn't have this 14 production then. I'm assuming, Toni, that Gorman 15 -- I know Riddle is internal. Is Gorman internal 16 as well?</p> <p>17 THE WITNESS: Yes.</p> <p>18 MS. CITERA: I'm assuming by the number, yeah.</p> <p>19 THE WITNESS: Yes, he's an internal -- he was 20 an internal Abbott person.</p> <p>21 MS. ST. PETER-GRIFFITH: Okay. We can -- why 22 don't we --</p>	<p>1 Toni.</p> <p>2 BY THE WITNESS:</p> <p>3 A. Okay.</p> <p>4 Q. Sir, Exhibit 18, is a May 19th, 1993 5 letter from Christopher Herden, Contract Marketing 6 analyst, within Abbott Home Infusion to Gerald 7 Clouse, executive director of Kettering Healthcare. 8 Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. In the general -- We're not necessarily 11 going to go line by line of this letter. But the 12 general substance of the letter seems to be that 13 Midwest Home Infusion Services has a concern about 14 -- or apparently raised by Midwest legal counsel's 15 concern about percentage of collections and the 16 possible implication under Safe Harbor rules. Do 17 you see that in the second paragraph?</p> <p>18 A. I do.</p> <p>19 Q. The next -- First of all, approximately 20 how many of Abbott's Home Infusion partners raised 21 concerns about the legality or the compliance 22 implications of the percentage of collection</p>

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<p style="text-align: right;">Page 603</p> <p>1 arrangements?</p> <p>2 A. I don't know.</p> <p>3 MS. CITERA: Object to the form, outside the</p> <p>4 scope.</p> <p>5 THE WITNESS: Sorry.</p> <p>6 BY MS. ST. PETER-GRIFFITH:</p> <p>7 Q. The second sentence in that second</p> <p>8 paragraph reads, "Although Abbott is very</p> <p>9 comfortable with the structure of a percentage of</p> <p>10 collections agreement, Abbott nonetheless was</p> <p>11 willing to modify our agreement to follow a</p> <p>12 fee-for-service approach as requested by Midwest</p> <p>13 counsel." Do you see that?</p> <p>14 A. I do.</p> <p>15 Q. What's the difference between a</p> <p>16 percentage of collection and fee-for-service</p> <p>17 approach?</p> <p>18 MS. CITERA: Object to form, outside the</p> <p>19 scope.</p> <p>20 BY MS. ST. PETER-GRIFFITH:</p> <p>21 Q. Well, let me ask it this way: Is</p> <p>22 fee-for-service a particular type of arrangement</p>	<p style="text-align: right;">Page 605</p> <p>1 A. Correct. I think there might be -- I had</p> <p>2 provided products and/or services. This seems to</p> <p>3 differentiate products versus services. It looks</p> <p>4 at the end of this document, they're talking about</p> <p>5 a product sales agreement, which may mean -- again,</p> <p>6 I don't know, in this particular instance -- may</p> <p>7 mean just the sale of products versus a</p> <p>8 fee-for-service, appears to talk about payment for</p> <p>9 services.</p> <p>10 Q. Okay.</p> <p>11 A. And I suppose you could have four, you</p> <p>12 know, just fees, just products, just services, or</p> <p>13 both.</p> <p>14 Q. Got you.</p> <p>15 A. And the other one, and the percentage of</p> <p>16 collections.</p> <p>17 Q. In terms of this second sentence where it</p> <p>18 says although Abbott was very comfortable with the</p> <p>19 structure of a fee-for -- or percentage of</p> <p>20 collections agreement, other than what you've</p> <p>21 testified today, do you understand why Abbott was</p> <p>22 very comfortable with the percentage of collections</p>
<p style="text-align: right;">Page 604</p> <p>1 that Abbott Home Infusion was willing to offer to</p> <p>2 customers?</p> <p>3 MS. CITERA: Same objections.</p> <p>4 THE WITNESS: I'm sorry. Did you get your</p> <p>5 objection?</p> <p>6 MS. CITERA: She got it.</p> <p>7 BY THE WITNESS:</p> <p>8 A. Okay. I don't have personal knowledge.</p> <p>9 The term "fee-for-service" suggests that a payment,</p> <p>10 there's a negotiated payment for a -- for a service</p> <p>11 provided.</p> <p>12 Q. Okay. Going back to when we earlier on</p> <p>13 in the day discussed your understanding of the</p> <p>14 different structures, would that be the type of</p> <p>15 arrangement which you indicated was one of the</p> <p>16 possible Home Infusion arrangements whereby the</p> <p>17 customer would buy the product and then pay for</p> <p>18 services --</p> <p>19 MS. CITERA: Same objections.</p> <p>20 BY MS. ST. PETER-GRIFFITH:</p> <p>21 Q. -- as opposed to receiving it on a</p> <p>22 consignment basis?</p>	<p style="text-align: right;">Page 606</p> <p>1 agreements? And if you want to rely upon your</p> <p>2 prior testimony, that's fine.</p> <p>3 MS. CITERA: Objection to form, outside the</p> <p>4 scope.</p> <p>5 BY THE WITNESS:</p> <p>6 A. I don't have anything to add to my prior</p> <p>7 testimony.</p> <p>8 Q. Okay.</p> <p>9 (Exhibit Fishman 019</p> <p>10 marked as requested.)</p> <p>11 MS. CITERA: I'm sorry. I'm going to have to</p> <p>12 do the same thing. I don't understand why this was</p> <p>13 produced. I'm going to have to ask about it.</p> <p>14 We're going to have to table it as well.</p> <p>15 MS. ST. PETER-GRIFFITH: Okay. Toni, I just</p> <p>16 want to point out that -- just the -- its Bates</p> <p>17 numbers are sequential. So I believe this may have</p> <p>18 been the memorandum that was sent out to Gerald</p> <p>19 Clouse, or at least this set is sequential.</p> <p>20 MS. CITERA: Yeah, I understand what you're</p> <p>21 saying. 18 and 19?</p> <p>22 MS. ST. PETER-GRIFFITH: Yeah.</p>

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<p style="text-align: right;">Page 607</p> <p>1 MS. CITERA: Let me just read this in more 2 detail, but you may be correct. 3 MS. ST. PETER-GRIFFITH: Sure. 4 MS. CITERA: I'm going to let you go into it 5 because it appears that you may be right. I'm 6 going to obviously reserve my right to snap it back 7 once I'm able to do further analysis and also to -- 8 I mean, I don't know that I can snap back the 9 testimony -- but, you know, to assert a privilege 10 over this. But, you know, based on the Bates range 11 and the date of the memo that is written by Mr. 12 Taylor and the date of the letter that is written 13 by Mr. Herden, and the fact it's Mr. Herden on both 14 memos, it would appear to be the same as the one 15 referred to in 18. 16 BY MS. ST. PETER-GRIFFITH: 17 Q. Mr. Fishman, have you had an opportunity 18 to review this document? 19 A. Yes, I have. 20 Q. And as we've just discussed, it appears 21 to be the memorandum that was attached to Exhibit 22 18. Sir, I'd like to go over some of what is</p>	<p style="text-align: right;">Page 609</p> <p>1 the letter. Other than what you've testified, are 2 you -- to already, are you aware of any other bases 3 for Abbott's comfort level with the legality of the 4 structure? 5 A. I am not. 6 Q. The next sentence reads, "After the Safe 7 Harbor was issued in 1991, we had a more complex 8 percentage of calculations contract reviewed by 9 Washington, D.C., counsel, specializing in the 10 Medicare area." Right? 11 A. I see that. 12 Q. Why did Abbott undertake such a review 13 after the publication of the Medicare Safe Harbors 14 issued in 1991? 15 MS. CITERA: Objection to the form, outside 16 the scope. I also would caution you not to reveal 17 any privileged communications. 18 BY THE WITNESS: 19 A. I don't know precisely, but I also don't 20 know that the reference to review by Washington 21 counsel was also part of the Ingalls analysis. And 22 it talks about a more complex percentage of</p>
<p style="text-align: right;">Page 608</p> <p>1 contained in Mr. -- this appears to be a memo from 2 the Office of General Counsel signed by Brian S. 3 Taylor. Do you see that? 4 A. I do. 5 Q. -- attorney, dated May 18, 1993 to C. 6 Herden regarding Midwest Home Infusion Services, 7 right? 8 A. Correct. 9 Q. Did you discuss any of these memoranda 10 with Mr. Taylor when you spoke with him? 11 A. I did not. 12 Q. The first paragraph appears to sort of 13 discuss the issue with -- 14 A. Can I add, I didn't because I didn't know 15 they existed. 16 Q. Okay. The first sentence of the second 17 paragraph indicates as background, Abbott used a 18 percentage of collections approach in a number of 19 contracts and is comfortable with the legality of 20 the structure. 21 Again, I'm going to ask you the same 22 question I asked you about a similar statement in</p>	<p style="text-align: right;">Page 610</p> <p>1 collections contract which might have been that 2 contract. 3 Q. Okay. 4 A. So the clause after the Medicare Safe 5 Harbors issued in 1991 might be just a reference 6 point for where in the regulatory world an analysis 7 occurred. 8 Q. Okay. Who was that Washington, D.C. 9 counsel? 10 A. I understand it to be Hogan & Hartson. 11 Q. Who were the two partners who were former 12 senior staff to OIG, Office of Inspector General? 13 A. I can't answer that, nor do I know the 14 name I mentioned is one of those two. I don't know 15 her background to know whether Liz Dunst was a 16 senior staff -- prior senior staffer on OIG. 17 Q. Why did these lawyers or did these 18 counsel provide a basis for their conclusion that 19 they saw no basis for the transaction under 20 Medicare law? 21 MS. CITERA: Objection to the form, outside 22 the scope.</p>

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<p>1 BY THE WITNESS:</p> <p>2 A. I'm sorry. Can you repeat the question?</p> <p>3 MS. ST. PETER-GRIFFITH: Sure. Can you read</p> <p>4 it back.</p> <p>5 (Record read as requested.)</p> <p>6 MS. CITERA: Same objections, and I also</p> <p>7 caution you not to reveal any privilege.</p> <p>8 BY THE WITNESS:</p> <p>9 A. Any basis -- any basis for their</p> <p>10 conclusion and any conclusion they reached would</p> <p>11 have been privileged.</p> <p>12 MS. ST. PETER-GRIFFITH: Are you instructing</p> <p>13 him not to answer?</p> <p>14 MS. CITERA: I am.</p> <p>15 MS. ST. PETER-GRIFFITH: Okay. I mean, it's</p> <p>16 our position that this issue is waived. I'd like</p> <p>17 to discover the predicate for the statement that</p> <p>18 they saw no problem for this transaction under the</p> <p>19 Medicare law.</p> <p>20 MS. CITERA: Obviously we disagree with that</p> <p>21 statement, and I'm instructing him not to answer.</p> <p>22 BY MS. ST. PETER-GRIFFITH:</p>	<p>1 Infusion undertake routine or regular reviews to</p> <p>2 ensure that it did more than a superficial --</p> <p>3 superficial review to substantiate the legitimacy</p> <p>4 of the percentage figure?</p> <p>5 MS. CITERA: Same objections, caution.</p> <p>6 BY THE WITNESS:</p> <p>7 A. I don't know.</p> <p>8 Q. The next sentence reads, "The attorneys</p> <p>9 asked questions concerning the elements that went</p> <p>10 into the percentage figures and were satisfied with</p> <p>11 answers and rationale for this approach." Do you</p> <p>12 see that?</p> <p>13 A. I do.</p> <p>14 Q. What questions were asked?</p> <p>15 MS. CITERA: Same objections, same caution.</p> <p>16 BY THE WITNESS:</p> <p>17 A. I don't know what the questions asked</p> <p>18 were or the answers given, but I think any</p> <p>19 communication with counsel would have been</p> <p>20 privileged.</p> <p>21 MS. ST. PETER-GRIFFITH: Well, Toni, I know he</p> <p>22 doesn't know. But it's our position that this is</p>
<p style="text-align: center;">Page 612</p> <p>1 Q. The next sentence reads, "The Safe</p> <p>2 Harbors recognize percentage arrangements have a</p> <p>3 place in healthcare -- in healthcare business; but</p> <p>4 from a concern that a percentage arrangement could</p> <p>5 be devised to mask referral payments, the Safe</p> <p>6 Harbors require more than a superficial review to</p> <p>7 substantiate the legitimacy of the percentage</p> <p>8 figure." Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. What measures did Abbott undertake, did</p> <p>11 Abbott Home Infusion undertake to ensure that it</p> <p>12 did more than a superficial review to substantiate</p> <p>13 the legitimacy of the percentage figure?</p> <p>14 MS. CITERA: Objection to form, outside the</p> <p>15 scope. I also caution you not to reveal any</p> <p>16 privileged communications.</p> <p>17 BY THE WITNESS:</p> <p>18 A. Yeah, I don't know what efforts the Home</p> <p>19 Infusion business took to establish their</p> <p>20 contractual terms, financial contractual terms.</p> <p>21 Q. Did -- For purposes of ensuring</p> <p>22 compliance with the Safe Harbors, did Abbott Home</p>	<p style="text-align: center;">Page 614</p> <p>1 discoverable and has been waived. And also to the</p> <p>2 extent that Abbott intends to rely upon an advice</p> <p>3 of counsel, we're entitled to get into it.</p> <p>4 MS. CITERA: Obviously we disagree.</p> <p>5 BY MS. ST. PETER-GRIFFITH:</p> <p>6 Q. Now, in the third paragraph, the second</p> <p>7 sentence reads, "First, in this uncertain</p> <p>8 environment of collection payments, this approach</p> <p>9 fosters a sense of partnership and commitment</p> <p>10 between companies through a risk -- through a</p> <p>11 sharing of risk." Do you see that?</p> <p>12 A. I do.</p> <p>13 Q. The next sentence reads, "It lets the</p> <p>14 other company know that Abbott is prepared to</p> <p>15 accept a portion of risk of nonpayment." Do you</p> <p>16 see that?</p> <p>17 A. I do.</p> <p>18 Q. Is that the risk of nonpayment that we</p> <p>19 were discussing before?</p> <p>20 MS. CITERA: Same objections and instruction.</p> <p>21 BY THE WITNESS:</p> <p>22 A. I don't know precisely what they're</p>

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<p style="text-align: right;">Page 615</p> <p>1 referring to; but it would be in a collection of 2 payments agreement, it would be nonpayment from any 3 patient.</p> <p>4 Q. Okay.</p> <p>5 A. Medicare or otherwise.</p> <p>6 Q. Okay.</p> <p>7 MS. CITERA: Ann, I'm just going to stop you 8 here because I think I want to take a break. I 9 appreciate you're asserting there was a waiver. I 10 don't think there was. I'd like to try to get a 11 little more information about this document before 12 we proceed.</p> <p>13 MS. ST. PETER-GRIFFITH: Okay. Well, we're 14 running a little short on time if you want to 15 finish before 4:30. Can we make it quick?</p> <p>16 MS. CITERA: At least let me make the inquiry 17 and see what I can do.</p> <p>18 MS. ST. PETER-GRIFFITH: Okay. Why don't we 19 go off the record briefly then.</p> <p>20 THE VIDEOGRAPHER: Going off the record at 21 2:51 p.m.</p> <p>22 (A short break was had.)</p>	<p style="text-align: right;">Page 617</p> <p>1 for Exhibit 17 back.</p> <p>2 MR. ANDERSON: That's got some notes on it.</p> <p>3 We'll destroy that one.</p> <p>4 MS. CITERA: Sure.</p> <p>5 MR. ANDERSON: Here's a clean copy.</p> <p>6 MS. ST. PETER-GRIFFITH: That's Page 2.</p> <p>7 MR. ANDERSON: You can do that just state 8 you'll destroy it.</p> <p>9 MS. ST. PETER-GRIFFITH: There we go, Toni.</p> <p>10 MS. CITERA: Obviously any other copies that 11 are at either of your offices, we would ask that 12 you destroy.</p> <p>13 MS. ST. PETER-GRIFFITH: You know what? At 14 the end of the day, I need to get the Bates numbers 15 of that.</p> <p>16 MS. CITERA: Okay. Okay.</p> <p>17 BY MS. ST. PETER-GRIFFITH:</p> <p>18 Q. Sir, if we could -- Where did we leave 19 off on this document?</p> <p>20 A. Are we on Exhibit 19 still?</p> <p>21 Q. Yes.</p> <p>22 A. Okay.</p>
<p style="text-align: right;">Page 616</p> <p>1 (Enter Mr. Anderson.)</p> <p>2 THE VIDEOGRAPHER: We're back on the record at 3 3:00 p.m.</p> <p>4 MS. CITERA: I'm going to let the deposition 5 and the questioning continue. You know, obviously 6 as I said before, we reserve the right to snap this 7 document back at a later time. Right now it 8 appears that it is a memo that was sent along with 9 the letter, Exhibit 18. But we are reserving our 10 rights. We obviously do not agree with you that 11 any privilege was waived. But we will continue 12 with the deposition.</p> <p>13 I will also add on a separate note that 14 Exhibit 17, we are snapping back.</p> <p>15 MS. ST. PETER-GRIFFITH: Okay. Toni, do you 16 just want to take custody, then, of the actual 17 marked exhibit?</p> <p>18 MS. CITERA: Uh-huh.</p> <p>19 MS. ST. PETER-GRIFFITH: We'll just let the 20 record reflect counsel for Abbott has possession of 21 that document.</p> <p>22 MS. CITERA: And then we would obviously ask</p>	<p style="text-align: right;">Page 618</p> <p>1 Q. We were discussing the portion, I 2 believe, of this memorandum concerning the 3 uncertainty of collection of payments and the risk 4 of nonpayment, right?</p> <p>5 A. Oh, the second -- you were reading the 6 second sentence in the third paragraph?</p> <p>7 Q. Yes.</p> <p>8 A. Okay. I'm sorry. Was there an 9 outstanding question pending?</p> <p>10 Q. Sure, sure. I just wanted to first say, 11 was that your recollection of where we left off?</p> <p>12 A. Yeah. I was reading -- I don't know if 13 it was the second and third sentence or just the 14 second sentence?</p> <p>15 Q. Well, I'd like to direct your attention 16 to the third sentence. I mean, we spent some time 17 earlier today going over Abbott's risk of 18 nonpayment.</p> <p>19 Is the risk of nonpayment to Abbott 20 two-fold: First, the cost of its product and, 21 second, the cost of the services provided with 22 regard to a particular patient who may not be</p>